No. 84-932 (2)

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In the Supreme Court of the United States

OCTOBER TERM, 1984

CED'S, INC., d/b/a PRODUCTS FOR POWER, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the administrative search warrant issued in this case was invalid for lack of administrative probable cause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-19a) is reported at 745 F.2d 1092. The opinions of the district court (Pet. App. 20a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1984. A petition for rehearing was denied on October 29, 1984 (Pet. App. 3a). The petition for a writ of certiorari was filed on December 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Sections 114(a) and 203(a) of the Clean Air Act, 42 U.S.C. 7414(a), 7522(a), and the Fourth Amendment to the Constitution are set forth at Pet. 3-5.

STATEMENT

1. Petitioner is a manufacturer and distributor of catalytic converter replacement pipes ("test tubes") for automobiles.[1] These replacement pipes are hollow metal tubes that can be installed in place of catalytic converters. They perform absolutely no emission control. Pet. App. 5a. Section 203(a)(3)(B) of the Clean Air Act (the Act), 42 U.S.C. 7522(a)(3)(B), prohibits specified persons, including persons in the automobile repair industry, from knowingly removing or rendering inoperative any emission control device on an automobile after it is sold.[2] Section 203(a) also prohibits "the causing" of the acts prohibited in that section, including the acts described in Section 203(a)(3)(B).

The Environmental Protection Agency (EPA) has been investigating its suspicion that there is a pervasive practice of unlawful installment of catalyst replacement pipes by automobile repair facilities (Pet. App. 5a). As part of that investigation, on April 5, 1983, EPA applied for and obtained an administrative search warrant from a magistrate of the United States District Court for the Northern District of Illinois, authorizing EPA to enter petitioner's business premises to inspect and copy specified business records relevant to the marketing, sale, and distribution of test tubes from 1979 through 1982 (Pet. App. 46a-48a).[3] The

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[1]Catalytic converters are the primary means of controlling emissions of certain air pollutants from automobiles manufactured after 1975.

[2] The Clean Air Act does not prohibit individual car owners from removing catalytic converters and installing replacement pipes on their own cars; nor does it prohibit temporary installation of a replacement pipe for legitimate testing purposes.

[3]Contrary to petitioner's statement (Pet. 6), the warrant did not authorize a general, unrestricted inspection of petitioner's facility or all of its records. The warrant was, in fact, limited to inspection of specified records and subject to other restrictions on its scope and duration. See Pet. App. 46a-48a.

warrant application specified that there was "probable cause to believe that [petitioner], through the sale, distribution and promotion of test tubes to regulated automotive repair facilities is 'causing' such repair facilities to remove or render inoperative emission control devices in violation of section 203(a)(3) of the Act" (Pet. App. 50a).

2. On April 6, 1983, the warrant was served and petitioner filed a motion with the magistrate to quash the warrant. That motion was denied on the same day. On April 7, 1983, petitioner filed a complaint and motion in the district court seeking an injunction to compel return of the copied records.[4] After several hearings, the district court issued an order on July 1, 1983, permanently enjoining EPA from making any use of the copied records and ordering EPA to return the copies to petitioner (Pet. App. 30a). The court held that EPA lacked statutory authority to conduct the inspection because it concluded that Section 114(a)(2) authorized EPA to inspect only those persons required to keep records under Section 114(a)(1) (Pet. App. 33a). On July 22, 1983, EPA moved the district court to stay its order pending appeal. On November 1, 1983, the district court issued an order denying EPA's motion for a stay, as well as a supplemental memorandum opinion purporting to modify its July 1 opinion (Pet. App. 21a-28a).

3. The court of appeals vacated the district court's supplemental opinion, holding that the lower court had been divested of jurisdiction on August 31, 1983, when EPA filed its notice of appeal (Pet. App. 7a-9a).[5] The court then reversed the July 1, 1983, order, holding: (1) that Section 114(a) of the Clean Air Act authorizes EPA to enter the

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[4]Pursuant to an agreement made between EPA and petitioner on April 7, EPA did not use the copied records for any investigation until June 1, 1983.

[5]Petitioner does not dispute the correctness of this holding.

premises of any person "subject to any requirement of" the Act and to inspect and copy routine business records, as well as records the Administrator has required to be kept by such person; and (2) that petitioner is a person subject to a requirement of the Act because it is prohibited by Section 203(a) from causing actions proscribed by Section 203(a)(3)(B) (Pet. App. 10a-18a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner's principal argument (Pet. 10-19) is that the decision below is inconsistent with *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), and its progeny because it permits an administrative inspection of business premises and records in the absence of probable cause. Specifically, petitioner argues (Pet. 10, 12, 16-17) that the inspection was unconstitutional because EPA's warrant application allegedly was unsupported by any facts or allegations establishing that petitioner had violated the Clean Air Act. This contention was not pursued below and hence is not properly presented in this Court; in any event, it is without merit.

a. Neither the court of appeals nor the district court ruled on the question whether the warrant was invalid under the Fourth Amendment for lack of probable cause. In the district court, petitioner's principal claim was that Section 114(a)(2) of the Act did not give EPA authority to obtain the warrant, in part because petitioner contended that it was not subject to Section 203(a) or any other requirement of the Act. Indeed, petitioner specifically stated in its reply to EPA's memorandum in opposition to motion for permanent injunction that "[petitioner] has not raised probable cause as an issue in this matter" (App.,

infra, 1a). Accordingly, the district court's July 1, 1983, order and opinion addressed only the scope of EPA's statutory authority under Section 114(a)(2), not whether the warrant application established probable cause (see Pet. App. 33a-34a).

By the same token, petitioner did not brief the probable cause issue on appeal, and the court of appeals did not address it.[6] It is therefore inappropriate for this Court, in the first instance, to consider petitioner's present contention that the administrative search warrant was invalid for lack of probable cause. See *United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977); *Duignan* v. *United States,* 274 U.S. 195, 200 (1927). Moreover, since the courts below did not address this issue, petitioner's allegation that the decision below is a precedent that undermines *Barlow's* is manifestly unfounded.[7]

b. In any event, there is no merit to the contention that the warrant was unconstitutional for lack of probable cause. The warrant application was supported by extensive evidence showing reason to believe that repair shops supplied by petitioner were unlawfully installing test tubes and that petitioner was "causing" these violations through its

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[6]Indeed, the court noted that the question of probable cause was "not pertinent" to petitioner's contention that EPA lacked statutory authority to inspect it (Pet. App. 11a).

[7]Indeed, petitioner itself states (Pet. 15 n.9) that the Seventh Circuit has correctly applied *Barlow's* in other cases. Contrary to petitioner's suggestion (Pet. 12), the fact that the court of appeals, in finding statutory authority here for the inspection, did not expressly note the obvious -- that that authority is limited by the Fourth Amendment —plainly does not indicate that the court was holding that EPA's authority under the Clean Air Act is not subject to constitutional limitations. EPA does not dispute that its inspection authority under the Act is subject to Fourth Amendment limitations.

sale and promotion practices (see Pet. App. 49a-67a).[8] The warrant application also demonstrated the need for an inspection of petitioner's records to advance the investigation of these activities (*id.* at 52a-53a). In these circumstances, it was clear that there was a strong public interest that outweighed the limited intrusion of inspecting petitioner's records, and the magistrate correctly concluded that EPA had established administrative probable cause that justified the inspection of petitioner's records. See *Camara* v. *Municipal Court*, 387 U.S. 523, 539 (1967); *West Point-Pepperell, Inc.* v. *Donovan*, 689 F.2d 950, 957-958 (11th Cir. 1982); *Blackie's House of Beef, Inc.* v. *Castillo*, 659 F.2d 1211, 1224-1227 (D.C. Cir. 1981), cert. denied, 455 U.S. 940 (1982).[9] Indeed, although not an issue below, the warrant was justified not only because of the reasonable belief that petitioner was violating the Act, but because petitioner's records were surely probative evidence in connection with the investigation of the repair facilities supplied by petitioner and identified in the warrant application. See *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 555-556 (1978).

2. Petitioner does not specifically challenge the court of appeals' rulings on the scope of EPA's statutory authority,

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[8]The warrant application stated (Pet. App. 50a-51a) that EPA believed that "sale, distribution and promotion" of replacement pipes to repair facilities was causing those facilities to remove catalytic converters permanently. The primary affidavit supporting the application explained in detail how petitioner's promotion and sales tactics could cause unlawful use of its product by extolling the benefits of permanent catalytic converter replacement in advertisements and at conventions attended by members of the auto repair industry (*id.* at 62a-66a). The affidavit also showed that far more replacement pipes were being sold than were likely to be used for lawful purposes (*id.* at 66a).

[9]Contrary to petitioner's repeated suggestions (Pet. 11, 14-15, 17), the Fourth Amendment does not require that an agency *know* that a violation is occurring before it may conduct an inspection.

which formed the focus of the litigation in the lower courts. Petitioner does, however, briefly assert (Pet. 16) that EPA lacked authority to inspect its records because they were not required to be kept by the Act. Petitioner also criticizes (Pet. 12) the court's conclusion that the prohibition against "causing" tampering with catalytic converters is applicable to persons not specifically covered by Section 203(a)(3)(B). The court of appeals correctly resolved these questions of statutory interpretation, and no other court has ruled to the contrary; hence there is no reason for this Court to review those questions.

a. With respect to EPA's inspection authority under Section 114(a)(2)(A), the court of appeals stated that the natural reading of the provisions indicates that the phrase "such person" refers to persons "who own or operate emission sources or who are subject to any requirement" of the Clean Air Act (Pet. App. 14a-15a). This reading is further supported by the legislative history of Section 114(a) (see Pet. App. 15a-16a). Thus, the court correctly held that Section 114(a)(2)(B) authorizes EPA, in appropriate circumstances, to enter for inspection purposes the premises of any person subject to any requirement of the Act (Pet. App. 17a).[10] By the same token, the court correctly found (*id.* at 17a-18a) that Congress intended to give EPA authority to inspect "any records" of any person subject to the Act, including routine business records not previously required to be maintained.

b. The court of appeals also was right in concluding that "[petitioner], along with everyone else, is clearly prohibited

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[10]This authority is, of course, subject to constitutional limitations and the statutory provisions stating the permissible purposes of such an inspection. 42 U.S.C. 7414(a)(i)-(iii).

by section 203(a) from causing any act described in subsection (3)(B)" (Pet. App. 10a).[11] Section 203(a) unambiguously prohibits "[t]he following acts and the causing thereof * * *," without any limitation as to what type of person is subject to the "causing" prohibition. Moreover, application of this prohibition to petitioner is strongly supported by the 1977 Conference Report on the Act, which explicitly notes with reference to Section 114(a) that the inspection authority extends to "auto parts makers." See Pet. App. 12a-13a; 123 Cong. Rec. 27070 (1977). Therefore, the court correctly found that petitioner is a person "subject to any requirement" of the Act within the meaning of Section 114(a). Accordingly, petitioner is subject to EPA's inspection authority as long as there are reasonable grounds for an inspection.

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[11]The court plainly did not hold, however, that petitioner actually had violated Section 203(a). Indeed, it noted that such an inquiry was "not pertinent" to its consideration of the case (Pet. App. 11a). Thus, there is no basis for petitioner's contention (Pet. 16-17) that this Court should grant certiorari "to correct the impression" left by the court of appeals on the meaning of "causing."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DOJ-1985-03

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CED'S, INC., d/b/a PRODUCTS FOR POWER,	)	
	)	
Plaintiff,	)	HONORABLE JOHN A. NORDBERG
	)	
v.	)	NO. 83 C 2409
	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	
	)	
Defendants.	)	

[EXCERPT FROM] CED'S REPLY TO EPA'S MEMORANDUM IN OPPOSITION TO MOTION FOR PERMANENT INJUNCTION

Argument

I. The Issue is not one of Probable Cause, but Whether EPA Acted Outside the Scope of its Statutory Authority.

CED'S has not raised probable cause as an issue in this matter. EPA, however, repeatedly characterizes CED'S motion and appeal as an attempt to re-raise the issue of probable cause for the Magistrate's issuance of the Administrative Warrant. EPA cites numerous cases which deal with the standards of review and jurisdictional problems associated with the issue of probable cause. EPA's

argument, however, subsumes and side-steps a more basic issue — whether EPA has authority to obtain an administrative warrant under the Clean Air Act and the regulations promulgated by EPA thereunder. CED'S contends that, while EPA may well have authority to promulgate regulations directly affecting CED'S business, it has not done so and therefore lacks authority, under the Clean Air Act, to enter CED'S facility or inspect any records located thereon.

* * * * *